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No. 82-596

In the Supreme Court of the United States

OCTOBER TERM, 1982

RUSSELL BUFALINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant's failure to respond to a government pretrial motion tolls the time limits of the Speedy Trial Act, in circumstances where the district court makes clear that no disposition of the motion will be made until the defendant's position is established.

2. Whether the district court's instructions to the jury respecting the credibility of accomplices were adequate.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 683 F.2d 639.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a) was entered on June 15, 1982, and a petition for rehearing was denied on August 4, 1982 (Pet. App. 21a). The petition for a writ of certiorari was filed on October 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, peti-

tioner was convicted of conspiring to violate the civil rights of a United States citizen by entering an agreement to murder a federal witness, in violation of 18 U.S.C. 241, and of endeavoring to obstruct justice by commissioning others to murder the witness, in violation of 18 U.S.C. 1503. He was sentenced to 10 years' imprisonment and fined $10,000 on the conspiracy count. He was also sentenced to a concurrent term of five years' imprisonment and fined $3,000 on the obstruction count. The court of appeals affirmed.

1. The evidence is summarized in the opinion of the court of appeals (Pet. App. 2a-3a). Petitioner is a boss in a Pennsylvania-based organized crime "family." In April 1976 a federal grand jury sitting in the Southern District of New York was investigating a charge that petitioner had used extortionate means to collect a $25,000 debt from one Jack Napoli. Napoli testified before the grand jury and thereafter became a participant in the Justice Department's Witness Protection Program. He was secretly relocated by the United States Marshal's Service to Walnut Creek, California. In August 1976, petitioner met with his co-defendant, Michael Rizzitello, in a New York restaurant and told Rizzitello that Napoli was living in Walnut Creek and that he wanted Napoli killed. One month later, Rizzitello told James Fratianno, the acting head of the Los Angeles Cosa Nostra, that petitioner wished to have Napoli killed, and arranged a meeting between Fratianno and petitioner to discuss the murder. The two men met a few days later, and petitioner described Napoli to Fratianno and told Fratianno that Napoli had opened a pork business in Walnut Creek. When Fratianno returned to California, he unsuccessfully looked for Napoli.

In October 1976, petitioner was indicted on charges stemming from the extortion of Napoli. He was tried a year later. Napoli testified for the prosecution. Petitioner was convicted and sentenced to four years' imprisonment. While serving his extortion sentence in the Danbury Federal Correctional Center in Connecticut, petitioner met fellow inmate Steven Fox, a member of the Pagan motorcycle gang. Fox was given a parole date of July 18, 1980, but he was required to secure a job and a place to live as a condition of parole. Petitioner obtained a job for Fox with a trucking firm, but told Fox that he would be expected to perform a favor for petitioner in exchange for the job. The favor demanded was the murder of Napoli. Petitioner told Fox that his employer at the trucking firm would provide him with Napoli's name and address. Fox was paroled, worked for only a few days, and fled to Florida before the necessary information was conveyed.

2. Prior to petitioner's trial in the instant case, on March 27, 1981, the government moved to sequester the jury. Neither petitioner nor his co-defendant responded to the motion in any fashion. Six months later, when neither defendant had yet responded, the district court questioned defense counsel as to their position and indicated its reluctance to sequester the jury unless defendants agreed to sequestration. The court noted with concern that the sequestration might be "like notifying the jury that we have 'dangerous people' floating around someplace" (Pet. App. 12a-13a n.8). Defense counsel informed the district court that they had not yet had time to confer about the motion and would state their position later. The court again asked for the defendants' response on the day of trial, October 19, 1981. At that time defense counsel informed the court that defendants would

take no position on sequestration. Because defendants did not oppose sequestration, the motion was granted. Petitioner then moved to dismiss the indictment for an alleged violation of the Speedy Trial Act, 18 U.S.C. (& Supp. V) 3161 *et seq.*, and in the alternative requested that trial be continued. Both motions were denied.

On appeal, petitioner's speedy trial claim focused on the seven-month period during which the government's sequestration motion was pending. The government argued that the entire period should be excluded from speedy trial calculation, under 18 U.S.C. (Supp. V) 3161(h)(1)(F), which provides for exclusion of time elapsed while any pretrial motion is pending. Petitioner argued, however, that 18 U.S.C. (Supp. V) 3161(h)(1)(J), which provides for the exclusion of time "not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court," limits to 30 days the time excludable because of the pendency of the sequestration motion. The court of appeals rejected the government's contention that Section 3161(h)(1)(J) had no application here, concluding that only 30 days of elapsed time may be excluded once a pretrial motion has actually been taken under advisement (Pet. App. 6a-12a).[1] The court accepted, however, the government's alternative contention that because of the defendants' failure to respond to the sequestration motion, it was not taken under advise-

[1] The court cited with approval (Pet. App. 9a-10a) Speedy Trial Act guidelines issued by the Administrative Office of the United States Courts, specifying that a motion should be deemed to have been taken under advisement only when the court has received everything it expects from the parties that bears upon the particular motion.

ment at any time prior to October 19. Stressing the unusual factual circumstances, the court of appeals explained (Pet. App. 13a-14a):

> Because Judge Duffy was opposed to sequestration, his decision on the government's motion hinged on the defendants' positions towards it. If either one had shared his views of the dangers in sequestration, it is not unlikely that the government's motion would have been denied. Consequently, Judge Duffy could not have taken this motion under advisement in any meaningful way until the defendants made their positions known.[2]

The court also commented (*id.* at 14a) that petitioner,

> when faced with a government motion, had a duty to do more than stand by without taking a position and then reap the benefit of inaction by having the indictment dismissed on speedy trial grounds.

The court admonished the government, however, that in future cases a defendant's failure to respond to a government motion should be brought to the district court's attention (Pet. App. 15a).

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[2] The petition appendix omits a line from a sentence of the court of appeals' opinion which follows by one sentence the quoted passage. The sentence in question (with the portion omitted from the petition appendix italicized) reads (683 F.2d at 646):

> Over 750 criminal cases were filed in the Southern District in the year ending June 30, 1981, see Administrative Office of the United States Courts, Management Statistics for 1981 26 (1981), far too many for it to be reasonable to require the clerks *or the judges to guess each party's position on his* adversary's motions in order to calculate times under the Speedy Trial Act.

ARGUMENT

1. The decision of the court of appeals respecting petitioner's Speedy Trial Act claim is manifestly correct, and there is no suggestion that it conflicts with any decision of any other court. Further review of the fact-bound issue presented is accordingly unwarranted.

a. Petitioner prevailed on the major legal issue respecting the Speedy Trial Act presented to the court of appeals. Thus the court of appeals held that, notwithstanding the expansive language of 18 U.S.C. (Supp. V) 3161(h)(1)(F), which on its face requires exclusion from speedy trial reckoning of time elapsed during the pendency of a pretrial motion "from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," and notwithstanding the fact that no hearing was held on the sequestration motion, only 30 days of time could be excluded after the motion was taken under advisement.[3] The judgment of the court of appeals adverse to petitioner rests, therefore, upon

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[3] The court of appeals' decision in this respect appears to be at odds with decisions of several other courts of appeals. See, e.g., *United States* v. *Fogarty*, No. 82-1323 (8th Cir. Nov. 10, 1982); *United States* v. *Regilio*, 669 F.2d 1169 (7th Cir. 1981); *United States* v. *Brim*, 630 F.2d 1307 (8th Cir. 1980), cert. denied, 452 U.S. 966 (1981). Consistent with the decision of the court of appeals on this point is *United States* v. *Raineri*, 670 F.2d 702, 708 (7th Cir. 1982). See also *United States* v. *Molt*, 631 F.2d 258, 262 (3d Cir. 1980). The court of appeals below thought *Brim* and *Regilio* to be reconcilable with its decision and obviously did not have *Fogarty* before it. In any event, because petitioner prevailed on this issue, there is no occasion to determine whether there is a conflict requiring resolution on this score, much less to resolve any conflict, in this case.

the court's fact-bound ruling that under the circumstances of this case, the government's sequestration motion could not be treated as having been taken under advisement at any time prior to the date upon which the defendants put on the record their position respecting that motion, and that the time from the filing of the motion until its disposition on that same date was accordingly excludable under 18 U.S.C. (Supp. V) 3161(h)(1)(F).

Petitioner contends (Pet. 5-9) that the entire period at issue is excludable only if the motion is decided "promptly," and he complains that seven months is not "prompt." But this contention is misplaced on the present record, as is demonstrated by the legislative history of Section 3161(h)(1)(F), which fully supports the result reached by the court below. As originally enacted, the pretrial motion provision was narrow, excluding only "delay resulting from hearings on pretrial motions." 18 U.S.C. 3161(h)(1)(F). Thereafter, Congress was concerned that the Act was not being interpreted with sufficient flexibility. See S. Rep. No. 96-212, 96th Cong., 1st Sess. 17-20 (1979). Thus, in 1979, Congress revised the pretrial motion exclusion to embrace the entire period from "the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Speedy Trial Act Amendments of 1979, Section 4, 93 Stat. 327-328; see S. Rep. No. 96-212, *supra*, at 34. The Senate Report explains what Congress meant by the phrase "prompt disposition" (*ibid.*):

> Finally, the section provides exclusion of time from filing to the conclusion of hearings on or "other prompt disposition" of any motion. This later language is intended to provide a point at which time will cease to be excluded,

where motions are decided on the papers filed without hearing.

While the intended operation of Section 3161(h)(1)(F) when no hearing is held is not entirely clear (see page 4 and page 6 & note 3, *supra*), it is certain that the Section 3161(h)(1)(F) exclusion runs from the filing date of a motion at least until the date of the conclusion of any hearing or, when no hearing is held, at least until the date on which the court receives all pleadings and information from the parties necessary to its decision—in other words, the date on which the motion is ripe for decision and taken under advisement. Because the delay in disposition of the sequestration motion in this case is attributable to petitioner and his co-defendant, petitioner cannot complain of any failure promptly to dispose of the government's motion. There simply was nothing before the court ripe for disposition until the defendants had made their position known.

There is no occasion to review the court of appeals' conclusion that the district court properly deferred taking the sequestration motion under advisement. The court of appeals' decision is narrowly framed and closely tied to the specific facts in the record: the nature of the motion involved, the district court's solicitation of defendants' position, and the clear indication given counsel that the ruling was likely to hinge upon their response (see Pet. App. 13a-14a). Thus, the decision announced no rule of general applicability. And the decision is clearly correct given the facts presented, for defendants could well be expected to oppose the sequestration motion and would undoubtedly have complained upon appeal had an objection to sequestration been brushed aside as tardy. Thus the deci-

sion of the court of appeals does not create "a loophole in the Act which will give trial courts complete discretion in the scheduling of criminal trials," as petitioner claims (Pet. 9). This claim is especially devoid of foundation given the court of appeals' admonition to the government (Pet. App. 15a) to report in future cases to the district court any defendant's failure to respond within a reasonable time to a government motion.

As petitioner notes (Pet. 8), Congress was aware that the expanded pretrial motion exclusion created by the 1979 Speedy Trial Act Amendments created a potential loophole through which large chunks of time could slip. S. Rep. No. 96-212, *supra*, at 34. It accordingly recommended that district or circuit guidelines be drafted to prevent abuse of 18 U.S.C. (Supp. V) 3161(h)(1)(F). *Ibid.* But this legislative history necessarily supports the court of appeals' conclusion that the time elapsed here was not rendered nonexcludable by the language of Section 3161(h)(1)(F) as amended in 1979. And there is no suggestion that the *district court* violated applicable speedy trial guidelines or plan provisions by its failure to take the government's motion under submission before receiving a response. Instead, petitioner relies upon Second Circuit guidelines allowing *parties* 10 days to respond to a pretrial motion (Pet. 9). Petitioner, of course, did not comply with those guidelines. It may well be that the district could would not have abused its discretion had it treated petitioner's failure to respond within 10 days as an acquiescence in the government's motion. It does not follow, however, that the district court abused its discretion by insisting instead upon hearing petitioner's position, if any, respecting the sensitive issue of sequestration,

before taking the motion under advisement. In any event, petitioner's claim that the Second Circuit misapplied its own Speedy Trial Act guidelines plainly presents no issue for this Court.

b. Petitioner also argues (Pet. 9-11), however, that a defendant may not "waive" his rights under the Speedy Trial Act,[4] and hence that the clock should have continued to run despite his failure to respond to the sequestration motion. But, as the court of appeals explained (Pet. 14a), its decision does not rest upon any theory of waiver. Petitioner's failure to respond to the sequestration motion was not treated as a waiver of any rights—it merely extended the excludable period prescribed by the Act itself. Similarly, whenever a defendant files a pretrial motion, takes an interlocutory appeal, or submits to a competency examination, he stops the speedy trial "clock." But those actions cannot properly be analyzed as waivers of the right to be tried within 70 includable days of indictment. In short,

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[4] The Speedy Trial Act is silent on the question of waivers. The Senate report, however, states that it would be contrary to the primary purpose of the Act to permit defendants to waive the 70-day limit. S. Rep. No. 96-212, *supra*, at 29. The Act's primary purpose is to protect the public's right to a speedy trial. The public has an interest in seeing that criminals are brought to book swiftly, and therefore a defendant should not be permitted to slow the criminal process. Congress recognized that it is often in the defendant's interest to delay the trial in order to postpone his imprisonment. Congress thus exhorted the courts not to accept waivers. But nothing in the legislative history suggests that the courts must prevent even forms of delay sanctioned by the Act, subordinating every other consideration, including the fundamental values of our adversary system of justice implicated here, to the goal of expedition.

the question whether a defendant can waive the 70-day limit of the Act is not presented here.

2. Petitioner also contends (Pet. 12-14) that the district court committed reversible error when it refused to instruct the jury that the testimony of accomplices should be "scrutinized with care and caution." On the contrary, the court was under no obligation to use the precise language requested by petitioner. When viewed as a whole (see *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), the instruction given adequately conveyed the same message, especially when considered in the context of the particular accomplice testimony received at trial.

a. Both Fox and Fratianno, the two men engaged by petitioner to kill Napoli, testified for the government. Defense counsel cross-examined them vigorously and at the close of the evidence argued that Fratianno was a "pathological liar" and that neither he nor Fox should be believed (Tr. 765-766). The court then instructed the jurors that they must "pass upon the credibility of the witnesses" and "resolve such differences as there may be between their testimony" (Tr. 790). In determining credibility the court instructed the jury to use its "every day common sense" (Tr. 794) and enumerated various relevant factors, including "demeanor, [the witness'] lack of candor, his or her ability to express themselves, possible interest that the witness might have, possible bias, the strength of recollection, the accuracy of their recollection, [and] the witness' background" (Tr. 794). The court went on to state that a prior criminal act or "any immoral or discreditable act" could be taken into account, but that it was up to the jury to determine its weight (Tr. 794). Of course, the prior felony convictions and the

numerous criminal acts of both of the accomplices were in evidence. The jury was also alerted to the plea bargain Fratianno received on another charge, the grant of immunity that he received respecting the events he testified about, and the sums he received through his participation in the Department of Justice Witness Protection Program, as well as Fox's expectancy for early parole, and opportunity to join the witness protection program.

The court also charged the jurors that they "may consider whether a witness has a possible interest in the outcome of this case" (Tr. 794). With respect to Fratianno's and Fox's testimony, the court specifically instructed (Tr. 796):

> If you find * * * that an informer believes that he has a real interest in the outcome of this case, then you can consider that, also, in determining his credibility.

The court then gave the following example (Tr. 797):

> For example, if a person here, informer believes that his term of imprisonment may be shortened, not because of his testimony but because of the outcome of the case, alright, then he has a real interest in the outcome of the case. He might be said to have an interest anyway in the case from the very fact that he is testifying.

This example was an obvious reference to Fox, who had testified that he hoped his cooperation would result in reduction of his jail term (Tr. 444). The court further charged that the jury could consider past lies or contradictions, a reference that related mainly to Fratianno, who was cross-examined about many prior inconsistent statements (e.g., Tr. 257-

258) and prior lies under oath (e.g., Tr. 104-105, 174, 178, 185). The court concluded its discussion of accomplice testimony by remarking (Tr. 797):

> I am not saying and I don't want you to understand that the law imposes this, I am not saying that because a person has an interest that means they would testify falsely, I am just saying that it is something for you to consider. It is something that you determine what weight it will have.

The court concluded its charge on credibility by instructing the jurors that if they found a witness had lied at the trial they could "disregard that part which * * * [they] find to be a lie or * * * disregard all of the witness' testimony or * * *pick and choose" (Tr. 797).

b. The court of appeals held that the instructions given did not constitute reversible error (Pet. App. 17a-19a). Characterizing the portion of the instructions directed specifically at the credibility of the accomplices' testimony as "somewhat equivocal" and "arguably inadequate,"[5] the court was concerned that these instructions viewed in isolation highlighted one consideration relevant to the determination of accomplice credibility—interest in the outcome of the trial—to the exclusion of others (Pet. App. 18a). But the court concluded (*id.* at 19a) that the jury

> received ample evidence of the interest of [the accomplice] witnesses, and could be counted on to use its common sense in evaluati[ng] the

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[5] Petitioner thus exaggerates in representing (Pet. 13) that the "Second Circuit * * * agreed that this instruction was 'equivocal' and 'inadequate.' "

truth of their testimony. Besides, the defense summation—which referred to Fratianno as a "chronic pathological liar" to whom the government paid $200,000 "that might buy a lie"—more than compensated for the judge's omission.

c. Petitioner's challenge to the court of appeals' ruling is without merit. Petitioner acknowledges that the failure to give the instruction he sought is not reversible error in every case, but argues that the instruction given here served improperly to bolster the credibility of accomplice witnesses "by excluding from the jury's consideration crucial impeachment evidence" (Pet. 13). But the passages singled out by petitioner simply do not have that effect.[6] At most, they have the quite different (and less serious) imperfection suggested by the court of appeals—they do not include all of the factors that might cause a fact finder carefully to scrutinize the testimony of any accomplice. But this defect, if it was one, was merely an omission and not a direction to ignore any relevant matter. It was accordingly fully remedied by the balance of the district court's instructions, which addressed every material consideration. Indeed, the district court's penultimate statement on the subject of accomplice testimony, to

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[6] Petitioner quotes selectively from the passages in question (Pet. 13), omitting the district court's explanation of its statement (see Pet. App. 18a) that interest warranting special scrutiny of accomplice testimony would be established by the accomplice's belief "that his term of imprisonment may be shortened, *not because of his testimony but because of the outcome of the case*" (Pet. 13; emphasis petitioner's). The district court explained that an accomplice witness " 'might be said to have an interest anyway in the case from the very fact that he is testifying' " (Pet. App. 18a).

the effect that a person who has an interest in a case is not *necessarily* testifying falsely, but that the jury must consider that possibility (see page 13, *supra*), is in itself considerably more critical of the credibility of such witnesses than the instruction petitioner unsuccessfully sought.

Because any defect in the disputed passages of the jury instruction was a failure to marshal relevant evidence, rather than a direction to disregard such evidence, as petitioner claims, there was no error in the court of appeals' reliance (Pet. 19a) upon the actual evidence presented and the defense summation to compensate for any omission. Nor does the decision of the court of appeals conflict with *United States* v. *Bernard*, 625 F.2d 854, 857-858 (9th Cir. 1980), on which petitioner relies (Pet. 13). Although the Ninth Circuit concluded that the failure to give special instructions on the testimony of an accomplice was reversible error in that particular case, the court's decision rested heavily upon the presence of other factors suggesting an especially high degree of unreliability, none of which were addressed by any cautionary instructions. The present case is readily distinguishable because the district court gave extensive instructions bearing upon the credibility of accomplice witnesses. And the Ninth Circuit's observation, 625 F.2d at 857, that the defense counsel's summation could not take the place of an appropriate instruction on accomplice testimony, has little application where, as here, the district court gave instructions on credibility of accomplice testimony that could be faulted, if at all, only for focusing on one of the kinds of circumstances that might suggest an interest on the part of a witness that would warrant special scrutiny of his testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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